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No. 87-2104 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LAKE NACIMIENTO RANCH CO.,
A California Limited Partnership,

Petitioner,

vs.

COUNTY OF SAN LUIS OBISPO, CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case does not present the questions posed by Petitioner. The only questions presented are the following:

1. Can a landowner's claim that a general plan and zoning ordinance, which permits multiple uses, violates the Taking Clause *as applied* to its 1500-acre property be ripe for adjudication where (1) the landowner has never applied for any development under the zoning in question and (2) has presented no evidence that such application would be futile?

2. Can a landowner establish a *facial* Taking Clause claim that a general plan and zoning ordinance deprived it of all economically viable use of its 1500-acre property without evidence that no uses or combinations of uses under the zoning are economically viable?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. The 1980 General Plan And Land Use Ordinance 2

B. Petitioner's Property 3

REASONS FOR DENYING WRIT 5

A. THE AS-APPLIED CHALLENGE WAS PROPERLY HELD TO BE PREMATURE UNDER THIS COURT'S SETTLED STANDARDS 7

B. THE FACIAL ATTACK WAS UNSUPPORTED BY EVIDENCE OF DEPRIVATION OF ECONOMICALLY VIABLE USE OR OF REASONABLE INVESTMENT-BACKED EXPECTATIONS 13

1. Reasonable Investment-Backed Expectations 13

2. Economically Viable Use 17

CONCLUSION 23

Page

APPENDIX A

Excerpts from County of San Luis Obispo General Plan Land Use Element ("LUE") A-1

APPENDIX B

Excerpts from County of San Luis Obispo Real Property Division Ordinance and 1980 Land Use Ordinance ("LUO") B-1

APPENDIX C

Excerpts from Pertinent California Statutes C-1

TABLE OF AUTHORITIES

Page

Cases

Agins v. City of Tiburon
447 U.S. 255 (1980) 8, 17, 18, 23

American Savings & Loan Ass'n v.
County of Marin
653 F.2d 364 (9th Cir. 1981) 18

Andrus v. Allard
444 U.S. 51 (1979) 20

Austin v. City and County of Honolulu
850 F.2d 678 (9th Cir. 1988) 6

Avco Community Developers, Inc. v.
South Coast Regional Comm'n
17 Cal. 3d 785, 553 P.2d 546,
132 Cal. Rptr. 386 (1976), *appeal dismissed*,
429 U.S. 1083 (1977) 15, 16

Baker v. Burbank-Glendale-Pasadena
Airport Authority
39 Cal. 3d 862, 705 P.2d 866,
218 Cal. Rptr. 293 (1985) 6

Barancik v. County of Marin
No. 87-1982 (9th Cir., June 30, 1988)
(1988 U.S. App. LEXIS 9074) 12

Board of Regents of State Colleges v. Roth
408 U.S. 564 (1972) 14

	Page
Celotex Corp. v. Catrett 477 U.S. 317 (1986)	17
Connolly v. Pension Benefit Guaranty Corp. 475 U.S. 211 (1986)	14
Cormier v. County of San Luis Obispo 161 Cal. App. 3d 850, 207 Cal. Rptr. 880 (1984)	6
Dean Tarry Corp. v. Friedlander 826 F.2d 210 (2d Cir. 1987)	16
Deltona Corp. v. United States 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982)	16
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles 482 U.S. ___, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987)	6
Florida Rock Industries, Inc. v. United States 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 107 S. Ct. 926 (1987)	19
Furey v. City of Sacramento 592 F. Supp. 463 (E. D. Cal. 1984), *aff'd* 780 F.2d 1448 (9th Cir. 1986)	15, 16
Graham v. Estuary Properties, Inc. 399 So. 2d 1374 (Fla. 1981)	16

	Page
HFH, Ltd. v. Superior Court 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976)	15
Hadacheck v. Sebastian 239 U.S. 394 (1915)	18
Herrington v. County of Sonoma 834 F.2d 1488 (9th Cir. 1987)	9, 12
Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc. 452 U.S. 264 (1981)	7, 8
Keystone Bituminous Coal Ass'n v. DeBenedictis 480 U.S. ___, 107 S. Ct. 1232 (1987)	14, 17, 18
Kinzli v. City of Santa Cruz 818 F.2d 1449, *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 775 (1988)	11
Lake Nacimiento Ranch Co. v. County of San Luis Obispo 830 F.2d 977, *modified*, 841 F.2d 872 (9th Cir. 1987)	2
MacDonald, Sommer & Frates v. County of Yolo 477 U.S. 340 (1986)	7, 8, 12, 13
MacLeod v. County of Santa Clara 749 F.2d 541 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009 (1985)	16, 19

	Page
Nemmers v. City of Dubuque 716 F.2d 1194 (8th Cir. 1983)	16
Pace Resources, Inc. v. Shrewsbury Township 808 F.2d 1023 (3d Cir. 1987), *cert. denied*, 107 S. Ct. 2482 (1987)	16
Park Avenue Tower Associates v. City of New York 746 F.2d 135 (2d Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985)	19
Penn Central Transportation Co. v. City of New York 438 U.S. 104 (1978)	5, 13-15, 17,18
Pennell v. City of San Jose 108 S. Ct. 849 (1988)	13
Pompa Construction Corp. v. City of Saratoga Springs 706 F.2d 418 (2d Cir. 1983)	19
Ruckelshaus v. Monsanto Co. 467 U.S. 986 (1984)	14-16
San Luis Obispo Properties, Inc. v. Pacific Gas & Elec. Co. 28 Cal. App. 3d 556, 104 Cal. Rptr. 733 (1972)	20

Page

Shelter Creek Development Corp. v.
City of Oxnard
838 F.2d 375 (9th Cir. 1988), *petition for cert. filed* (U.S. July 15, 1988) (No. 88-86) 12

Thorpe v. Housing Authority of City of Durham
393 U.S. 268 (1969) 5

Village of Euclid v. Ambler Realty Co.,
272 U.S. 365 (1926) 18

Webb's Fabulous Pharmacies, Inc. v. Beckwith
449 U.S. 155 (1980) 14, 15

Wheeler v. City of Pleasant Grove
664 F.2d 99 (5th Cir. 1981), *cert. denied*,
456 U.S. 973 (1982) 16

Williamson County Regional Planning Comm'n
v. Hamilton Bank
473 U.S. 172, 105 S. Ct. 3108 (1985) 6-8, 12-14

Yale Auto Parts, Inc. v. Johnson
758 F.2d 54 (2d Cir. 1985) 16

Yick Wo v. Hopkins
118 U.S. 356 (1886) 7

Constitution

United States Constitution
Fifth Amendment 1
Fourteenth Amendment 1

Page

Federal Statute

42 U.S.C. § 1983 1

State Statutes

California Government Code:
Section 51200 *et seq.* 11, 22
Section 65302 2
Section 65358 15
Section 65361 15
Section 65906 9
Section 66474 (a) 9

California Revenue & Tax Code:
Section 423 11
Section 423.3 11

Local Regulations

1980 General Plan and Land Use Ordinance
(1980 LUE/LUO) *Passim*

Real Property Division Ordinance:
Section 21.48.017 11, 22
Section 21.48.090 10, 22

Land Use Ordinance:
Section 22.01.044 10, 22
Section 22.08.012 10, 22

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

In this action, petitioner sought declaratory and injunctive relief, as well as damages under 42 U.S.C. § 1983, on the theory that the County of San Luis Obispo's ("County's") 1980 General Plan and Land Use Ordinance had deprived its property of all economically viable use in violation of the Fifth and Fourteenth Amendments of the United States Constitution.[1]

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[1] In the courts below, petitioner also sought relief on a procedural due process theory based upon an alleged conflict of interest of a member of the County Board of Supervisors. Petitioner has abandoned the due process claim in its petition; it seeks certiorari only on the taking claim.

The District Court granted the County's motion for summary judgment in an unpublished opinion (Appendix D to Petition for Certiorari). The Ninth Circuit affirmed in an opinion reported at 830 F.2d 977 (Appendix A to Petition), and subsequently modified its decision in an opinion reported at 841 F.2d 872 (Appendix B to Petition). It also denied petitioner's petition for reconsideration and suggestion for rehearing en banc (Appendix C to Petition).

A. The 1980 General Plan and Land Use Ordinance.

California law requires each county to develop and maintain a comprehensive long-term General Plan for development, including a Land Use Element, which describes the County's official policy on the location, growth and development of land uses. Cal. Gov't Code § 65302.[2] The County's zoning ordinance (now called Land Use Ordinance) states its development standards and review procedures.

In 1980, the County amended the Land Use Element ("LUE") of its 1971 General Plan and its Land Use Ordinance ("LUO"). These amendments (the "1980 LUE/LUO"), which affected the Lake Nacimiento area in which petitioner's property lies, are the target of petitioner's taking claim.

Lake Nacimiento, an artificial reservoir created in 1960 to serve agricultural needs, lies in a remote area in northern San Luis Obispo County. Development has taken place since the creation of the lake, but in 1980 the economy of the region was still based upon agriculture, principally grazing and dry farming.

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[2] California code sections of particular pertinence are contained in Appendix C hereto. Relevant extracts of the County's 1980 General Plan and ordinances are contained in Appendices A and B. Additional portions of those documents were appended to the County's brief in the Ninth Circuit.

In 1980, public services around the lake, such as fire and police protection, were minimal, no public medical facilities existed within 25 miles, and roads and domestic water supplies were inadequate for estimated future needs. The County's tax base for financing new public services was limited. The County was also concerned about potential environmental damage to the lake and its watershed from further development.

To slow development until these problems could be solved, the 1980 LUE/LUO reduced the residential densities previously allowed for the existing developments around the lake and reclassified most of the remaining privately owned, undeveloped land from an "L (Recreation)" zone to a "Rural Lands" category.

The Rural Lands category, like the L (Recreation) zone, permitted single-family residences (increased to two per parcel) and light agricultural uses as a matter of right. In all, the Rural Lands category contains 8 *groups* of uses allowed as of right and 42 *groups* of special uses (allowable subject to special standards and/or processing requirements; South Shore standards restrict 12 of the 42 groups of special uses). See Appendix A. Each group may include multiple individual uses. For example, the "Rural Sports and Group Facilities" group includes hunting and fishing clubs, dude ranches, health resorts, recreational camps, group camps, and equestrian facilities.

B. Petitioner's Property.

Petitioner's approximately 1,500 acres on the south shore of Lake Nacimiento (the "South Shore Property") are part of an approximately 3,000-acre tract on the north and south shores purchased by its partners and their ancestors in 1964 (CR 140). Part of the tract was sold, and the remaining property is held in two limited partnerships (CR 124, Exs. V, G & H).

The South Shore Property has nine legal parcels (CR 124, Ex. K). There are no improvements other than a small corral and cattle-loading facility, worth about $100, and a one-lane "chip and seal" road (CR 124, Exs. V, W).[3] Petitioner's investors acquired the South Shore Property for investment, and the only use to which they have ever put the property since 1964 is to hold it for investment and to lease it in the interim for livestock grazing and equestrian purposes (CR 124, Ex. V).

Under the 1980 General Plan, the South Shore Property is primarily Rural Lands, except for a small parcel designated Recreation. In 1981, petitioner applied for a general plan amendment to place approximately 800 acres in the Recreation category (CR 39). The Planning Commission recommended approval for 630 acres, but after public hearing, the Board of Supervisors denied the application (*id.*).

At no time did petitioner or its predecessors present the County with an application to develop the property under the Rural Lands category (CR 124, Exs. V, W).

When petitioner's investors formed their limited partnership in 1975, they valued the South Shore Property at $521,000 (CR 124, Ex. G). Petitioner admitted that between 1975 and the time of the alleged taking, it only expended $66,565 on taxes and other expenses, and that it sold part of the property for $50,000 and received grazing lease income of $6,100 (CR 124, Ex. W).[4] It also admitted that the South Shore Property had a market value of $992,500 immediately following the

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[3] The North Shore portion of the property acquired in 1964, on the other hand, has been fairly intensively developed. Petitioner's investors received substantial income from a sale of a portion of this property, and the remaining property is zoned for uses that include multi- and single-family housing, marinas, theaters, swim and tennis clubs, and commercial and retail uses, among others (1980 LUE/LUO).

[4] In 1983 petitioner also obtained $500,000 in a refinancing of the property (*id.*, Ex. I).

alleged taking (giving petitioner a potential profit of $461,035 over the 1975 investment value), and that by March 1984 the market value of the property had increased to $1,740,000 (over three times the amount of its 1975 investment value) (*see* CR 124, Ex. U).

REASONS FOR DENYING WRIT

The principal reasons why this Court should not grant certiorari in this case are that

(1) while petitioner poses some interesting abstract questions for the Court to answer, those questions are not presented by this case; and

(2) the claimed conflicts between the decisions of this Court and the Ninth Circuit, or between those of the Ninth Circuit and other circuits, simply do not exist.

This case, therefore, does not meet any of the "special and important reasons" set forth in Supreme Court Rule 17 for granting certiorari.

What petitioner has requested of this Court is to issue an advisory opinion on the parameters of taking claims. To comply would contravene the constitutional and policy prohibitions on the issuance of advisory opinions,[5] as well as the important policy laid down by this Court through decades of experience, that the decision of whether a regulation constitutes a taking can only be made after a careful analysis of the facts of each case. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). That policy is of particular importance here, where the sole ground

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[5] As this Court stated in *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 284 (1969): "We do not sit, however, 'to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . .'"

of attack was on the economic viability of remaining uses,[6] an inquiry unique to the facts of each case.

The springboard for all petitioner's questions is its assertion that the undisputed evidence established that no economically viable use exists on its property under Rural Lands. Petitioner doubtless makes that assertion to suggest the existence of substantial, unresolved federal issues, but the assertion is false. There was, indeed, uncontradicted evidence of economically viable use, and it was petitioner's failure to introduce controverting evidence that caused both courts below to subject petitioner's facial claim to summary judgment.

As to petitioner's as-applied attack, the Ninth Circuit properly determined that the claim was premature. Notwithstanding petitioner's incorrect argument that the Ninth Circuit has applied ripeness rules more rigidly than is warranted by decisions of this Court, the challenge is premature under this Court's standards, because petitioner never made any application for development under Rural Lands, and it submitted no evidence that such an application would be futile. Finally, even had its as-applied claim been decided on the merits, both courts below correctly found that the evidence failed to present a triable issue as to deprivation of all economically viable use.

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[6] Petitioner did not and does not claim that the 1980 LUE/LUO fails to advance a legitimate state interest. Those amendments have previously been held constitutional in *Cormier v. County of San Luis Obispo*, 161 Cal. App. 3d 850, 207 Cal. Rptr. 880 (1984).

The Ninth Circuit did not address the other arm of the ripeness analysis, availability of an adequate state remedy, presumably because "at the time of the taking" California did not permit recovery of damages in regulatory taking cases. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 3121 (1985); *see First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. ___, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987); *Austin v. City and County of Honolulu*, 850 F.2d 678, 681 (9th Cir. 1988); *Baker v. Burbank-Glendale-Pasadena Airport Authority*, 39 Cal. 3d 862, 867 n.4, 705 P.2d 866, 218 Cal. Rptr. 293 (1985).

A. THE AS-APPLIED CHALLENGE WAS PROPERLY HELD TO BE PREMATURE UNDER THIS COURT'S SETTLED STANDARDS.

Petitioner claims that the Ninth Circuit too rigidly applied the ripeness tests of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), and *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986), by requiring it to apply for a development plan and to seek a waiver or variance to achieve ripeness.

Petitioner misconstrues the relevant authorities. This Court stated in *Williamson County* that "[a]s the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." 473 U.S. at 186.[7]

The Court referred to *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), in which it rejected an as-applied claim as premature because:

> "There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance from the approximate-original-contour requirement of § 515(d) or a waiver from the surface mining restrictions in § 522(e). If appellees were to seek administrative relief under these procedures, a mutually acceptable solution might well be

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[7] A zoning ordinance, by its nature, is usually applied to a piece of property when the owner applies for development under that ordinance. The usual as-applied zoning challenge thus differs from other kinds of as-applied regulatory challenges, which arise when government attempts to *enforce* the regulation against the individual. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

> reached with regard to individual properties, thereby obviating any need to address the constitutional questions." *Hodel*, 452 U.S. at 297 (footnote omitted).

Similarly, in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court held that an as-applied challenge to a zoning ordinance was not ripe because the property owners had not yet submitted a plan for development of their property.

Williamson County ruled that the owner's claim was in a posture similar to that in *Hodel*:

> "Respondent has submitted a plan for developing its property, and thus has passed beyond the *Agins* threshold. But, like the *Hodel* plaintiffs, respondent did not then seek variances that would have allowed it to develop the property according to its proposed plat . . . . It appears that variances could have been granted to resolve at least five of the Commission's eight objections to the plat.
>
> ". . . Absent a final decision regarding the application of *all* eight of the Commission's objections, it is impossible to tell whether the land retained any reasonable beneficial use . . . ." 473 U.S. at 187-188 & n.11 (emphasis in original).

MacDonald, Sommer & Frates held the claim there was premature despite the rejection of a development plan for intensive residential development, because that denial did not preclude the availability of less intensive, but still valuable, development, 106 S. Ct. at 2568 & n.8. As the Court stated: "Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable review." *Id.* at 2569, n.9.

In this case, unlike the owners in *Williamson County* and *MacDonald, Sommer & Frates*, petitioner never "passed beyond the *Agins* threshold" because it never applied for any development plan, formal or informal, under Rural Lands.

As petitioner correctly notes (pp. 19-20), the only application it ever made was its 1981 application for an amendment of the General Plan and LUO to rezone 800 acres to Recreation, a different land use category. That application, as petitioner also correctly notes, simply has no bearing on the issue of what development the County might or might not permit under the Rural Lands category.

The "informal proposal"[8] provided with the amendment application contemplated using the property as a recreational vehicle ("RV") park, which is not a permissible use under Rural Lands (see Appendix A). While California law gives the County the power to grant many waivers and variances, it prohibits waivers or variances to permit *uses* not allowable under a land use category, Cal. Gov't Code § 65906 (West 1983), and prohibits approval of any development plan that is inconsistent with the General Plan, Cal. Gov't Code § 66474(a) (West 1983).[9]

The denial of petitioner's amendment application thus provides no information about what uses the County would permit *within the Rural Lands category*.[10] As to that classification, petitioner never submitted any application.

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[8] In fact, the "informal proposal" was not an application for an RV park at all. It was an informal sketch submitted to the County with the application for LUE/LUO amendment to provide some parameters for the necessary environmental impact assessment (CR 116, Ex. N).

[9] *See Herrington v. County of Sonoma*, 834 F.2d 1488, 1496 (9th Cir. 1987), construing that provision.

[10] Far from applying the ripeness rules rigidly, the Ninth Circuit gave petitioner the benefit of the doubt by assuming that petitioner's submission constituted an informal development proposal. It nevertheless held that in light of the fact that "[t]he County's response specified the numerous deficiencies in the informal proposal and suggested ways to remedy them, . . . the County's denial of this informal request is not a final and authoritative decision exposing the nature and extent of permissible development under the Rural Lands classification." (Slip op., Appendix B-10 to Petition.)

Petitioner argues (pp. 21-22) for the first time that an application would have been futile because, it claims, the uncontradicted evidence showed that no economically viable uses were available under Rural Lands — even by waiver or variance.[11] That argument is a flat misstatement of the record, as is discussed fully in Part B.2 below regarding economic viability. Both courts below correctly held that, taking the evidence in the light most favorable to petitioner, there was no triable issue of fact to support the claim of deprivation of economically viable use.

The 1980 LUE/LUO does not limit petitioner to a single use of its 1,500-acre property; it permits different uses or *combinations of uses* on each of the nine legal parcels of property. As the Ninth Circuit properly noted, in addition to the extensive list of available uses contained in the LUE/LUO, waivers, variances and other statutory procedures are available to expand development potential within the Rural Lands classification and to improve the economic potential of the available uses.

Further, as the Ninth Circuit emphasized, LUO § 22.08.012 (cited as 22.08.120 in the opinion) allows the Planning Commission to waive or modify standards for permissible uses if it finds that specific conditions make the standards unnecessary or ineffective, and LUO § 22.01.044 allows a variance from development and planning area standards (other than parcel size or density) if special circumstances such as topography or property location would deprive the property of privileges enjoyed by other properties.

In addition, Real Property Division Ordinance § 21.48.090 permits modification of road and drainage specifications (road

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11 Petitioner fails to explain how one can assert an as-applied claim when no application has ever taken place. If it were true that the Rural Lands category permitted no economically viable use — even after consideration of all available waivers and variances — then the attack would be a *facial* one.

requirements having been a significant factor in petitioner's economic analysis), and § 21.48.017 permits adjusting parcel lines, which could permit maximizing the economic potential of the various parcels.

Of particular significance to this property, which has historically been used for cattle and horse grazing, an agricultural preserve designation could dramatically lower taxes on the property and permit a profitable operation.[12]

The undisputed evidence below was that waivers and variances are not only available, but are routinely granted by the County. Petitioner does not argue otherwise.

Therefore, petitioner's as-applied challenge must fail because it never made any application for development under Rural Lands, because extensive combinations of uses are available under that category, and because numerous waivers, variances, and other statutory procedures are available that could significantly enhance the development potential of the property. Where an unquestionably correct result has been reached under this Court's settled standards, no important or undecided question is presented for this Court's review.

Moreover, petitioner is incorrect that the Ninth Circuit is applying an overly rigid framework for ripeness analysis.[13]

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[12] Petitioner complained below that property taxes had exceeded the grazing lease income from the property. It has not, however, availed itself of the Williamson Act, Cal. Gov't Code § 51200 *et seq.*, by which land may be restricted by contract to agricultural uses. In such cases, the county assessor may not consider sales data in valuing the property, but may only value the property by capitalizing the annual rental income actually received and typical rents received in the area for similar land in similar use, or where such rental information is not available, based upon the income which such land reasonably would be expected to yield under prudent management. Cal. Rev. & Tax Code § 423. The property might also qualify for an even lower tax rate. *See* Cal. Rev. & Tax Code § 423.3.

[13] Indeed, this Court previously denied certiorari in *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 775 (1988), the case establishing that framework. If no reason existed to grant certiorari in *Kinzli*, certainly none exists here.

The Ninth Circuit correctly stated the general rule, derived from *Williamson County* and *MacDonald, Sommer & Frates*, that at least one meaningful application for a development plan and a meaningful application for a variance must be presented before a futility argument can be presented. There was no reason to depart from that general rule in this case, where no application had been made and no evidence of futility existed.

In fact, the Ninth Circuit has not rigidly applied the ripeness analysis where the facts demonstrate finality. In *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1987), for example, the court held the claim to be ripe even though the owner had not fully completed the application process and had not applied for a variance, because the requisite finality of decision had been achieved, and no variance was available within that zone. Further, noting that *MacDonald* had held that a *re*-application may be necessary to analyze economic impact, *Herrington* held that no re-application was necessary because the gravamen of that case was the irrationality of the ordinance, not its economic impact.

Thus, the difference in ripeness analysis depends on the nature of the claim, and is not a difference in *standards*, as suggested recently in *Barancik v. County of Marin*, No. 87-1982 (9th Cir., June 30, 1988) (1988 U.S. App. LEXIS 9074). The other recent Ninth Circuit cases, including *Barancik*, *Herrington*, and *Shelter Creek Development Corp. v. City of Oxnard*, 838 F.2d 375 (9th Cir. 1988), *petition for cert. filed* (U.S. July 15, 1988) (No. 88-86), involved claims that the ordinances violated due process in that they advanced no legitimate state interest or that they violated equal protection. On appeal, none involved a claim of deprivation of all economically viable use.

This case, on the other hand, is based *solely* on the economic impact of the 1980 LUE/LUO on petitioner's property (even if it were viewed as a due process claim that the ordinance had "gone too far," *see Williamson County*, 105 S. Ct.

at 3122-24). Such a claim, as every Justice of this Court has recognized, requires an evaluation of "the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald*, 477 U.S. at 359; *Williamson County; Pennell v. City of San Jose*, 108 S. Ct. 849 (1988) (majority and dissenting opinions). Such an evaluation cannot be made until petitioner makes an application and the County acts on it.

B. THE FACIAL ATTACK WAS UNSUPPORTED BY EVIDENCE OF DEPRIVATION OF ECONOMICALLY VIABLE USE OR OF REASONABLE INVESTMENT-BACKED EXPECTATIONS.

Petitioner, again erroneously, argues that two important questions arise out of the decision on its facial attack: failure to take account of its reasonable investment-backed profit expectations, and failure to place the burden of proving economically viable use on the County.

1. Reasonable Investment-Backed Expectations.

Petitioner's assertion (pp. 7-15) that there is confusion over the interpretation of "reasonable investment-backed expectations"[14] is simply incorrect. Further, both courts below were unquestionably correct in holding that the County had not unconstitutionally interfered with any such expectations.

Petitioner's discussion of "investment-backed expectations" reveals a fundamental misunderstanding of the concept.

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[14] In *Penn Central*, this Court stated that one factor to consider in analyzing whether a regulation has effected a taking is "the extent to which the regulation has interfered with distinct investment-backed expectations." 438 U.S. at 124.

Petitioner incorporates the issue into the analysis whether a regulation deprives the property owner of all economically viable use of its property. It is apparent from *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), and *Penn Central*, however, that the concepts of "economically viable use" and "reasonable investment-backed expectations" are distinct inquiries.[15]

As *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), pointed out, the Taking Clause protects property rights. In defining those rights, the Court applies the "basic axiom that '"[p]roperty interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."'" *Ruckelshaus*, 467 U.S. at 1001 (*quoting Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980), and *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

Ruckelshaus holds that there can be no reasonable expectation in the continuing existence of a police power regulation absent an "*express promise*" from the government. 467 U.S. at 1008.[16] Where the government has made no such promise,

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[15] As this Court stated in *Connolly*, in analyzing a regulatory taking claim, "we have identified *three* factors which have 'particular significance:' (1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'" *Connolly*, 106 S. Ct. at 1026 (quoting *Penn Central*, 438 U.S. at 124 (emphasis added)).

[16] In attempting to assert such rights, the property owners in *Penn Central* and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. ___, 107 S. Ct. 1232, 1247 (1987), attempted unsuccessfully to argue that they had particular property rights that had been interfered with *despite* the fact that their overall properties were admittedly profitable. A similar claim was unsuccessfully attempted in *Williamson County*; the property owner asserted that, in addition to his claim that he had been deprived of all economically viable use, he had acquired a vested right to his particular development plan that protected him from *any* impairment of his "vested right" or "expectation interest." 105 S. Ct. at 3119-20 n.12.

the plaintiff merely has a "unilateral expectation" of fulfilling its goals that is not constitutionally protected. *Ruckelshaus*, 467 U.S. at 1006-07; *Webb's*, 449 U.S. at 161.

Penn Central ruled, in the zoning context, that property owners have no constitutionally protectable interest in the most beneficial use of their land. 438 U.S. at 125. The Court rejected as "quite simply untenable" the contention that property owners "may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." 438 U.S. at 130. That is precisely what petitioner sought to do here.[17]

Neither state nor federal law creates a property right in existing zoning. It is black-letter law in California (and most if not all other states, for that matter) that a property owner has no vested right in the zoning on its property. *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 796, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *appeal dismissed*, 429 U.S. 1083 (1977); *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 521, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976).[18] A property owner can, however, obtain a vested property right that protects it from subsequent changes in zoning by obtaining a building permit and beginning substantial work or financial commitments under that permit. *Avco Community Developers, Inc.*, 17 Cal. 3d at 791.

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[17] This Court's rulings make it clear that to have a constitutionally protectable interest in a particular development project — over and above the constitutional protection against deprivation of all economically viable use — requires a state or federal statute or regulation creating an express promise against impairment of that project.

[18] Indeed, in California a general plan could be amended up to three (now four) times a year, Cal. Gov't Code § 65361 (now § 65358). *See Furey v. City of Sacramento*, 592 F. Supp. 463, 470 (E.D. Cal. 1984), *aff'd*, 780 F.2d 1448 (9th Cir. 1986).

Lower courts have not, as petitioner suggests, had difficulty in interpreting this Court's standards. In zoning and similar permit cases, they have without exception ruled that because government makes no "binding legislative commitment" to maintain the present zoning, a property owner has no reasonable expectation, investment-backed or otherwise, that the zoning will not be changed.[19] Where, on the other hand, the property owner has obtained a vested right under state or federal law, that property interest is protected by the Taking Clause.[20]

The correctness of the *Ruckelshaus* rule is evident when applied to this case. Petitioner's investors bought the property

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19 *Dean Tarry Corp. v. Friedlander*, 826 F.2d 210 (2d Cir. 1987) (Planning Board's wide discretion under zoning ordinance prevented developer's expectation of success for development plan from rising to the level of a property right meriting Taking Clause protection); *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985) (no entitlement to certificate of location); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023 (3d Cir. 1987), *cert. denied*, 107 S. Ct. 2482 (1987) (no reasonable investment-backed expectation in zoning); *MacLeod v. County of Santa Clara*, 749 F.2d 541, 548 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009 (1985) (applicant must have been aware standards and conditions governing issuance might cause application to be denied, and had no assurance that permit would issue; taking cannot be premised on denial of opportunity to exploit particular project he had come to believe would be available for development); *Deltona Corp. v. United States*, 657 F.2d 1184, 1193 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982); (developer must have been aware that standards and conditions governing issuance of permits could change; it therefore had no assurance that permits would issue); *Furey*, 592 F.Supp. at 470; *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (Fla. 1981) (developer had no statutory right to fill swamp land for construction; it had only its own subjective expectation that the land could be developed in the manner it proposed).

20 *Nemmers v. City of Dubuque*, 716 F.2d 1194 (8th Cir. 1983) (under taking clause of Iowa Constitution, plaintiff had acquired vested right by work performed and commitments made pursuant to building permit); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981), *cert. denied*, 456 U.S. 973 (1982) (building permit gave property owner an interest protected by Taking Clause); *Avco Community Developers, Inc.*, 17 Cal. 3d 785.

over 15 years before the zone change to which they objected. They have held the property vacant ever since, putting it to use only as grazing land. They could have protected themselves as to their purported expectations at any time by processing a development plan, but they did not do so. The ruling for which petitioner contends would allow a speculator to purchase property and hold it undeveloped in perpetuity, while tying the hands of government to rezone the property without paying compensation. Constitutional "justice and fairness" do not require the public to bear the cost of petitioner's business gamble of delaying development for so long.

2. Economically Viable Use.

Petitioner faced an "uphill battle in making a facial attack on the [zoning restriction] as a taking." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. ___, 107 S. Ct. 1232, 1247 (1987); slip op. at B-11. The hill was particularly steep in this instance because, as the Ninth Circuit recognized, the 1980 LUE/LUO did not restrict petitioner's property to only one or two uses. The Rural Lands category provided for numerous *groups* of special uses (see Appendix A), which could be used alone or in combination.

Petitioner chafes under the burden of proof that has been placed on it, but the burden of proving deprivation of economically viable use clearly rests there under *Penn Central*, *Agins*, and *Keystone*. That burden of proof does not change just because the matter is decided on summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Petitioner also requests this Court to issue guidance as to precisely what factors must be considered in every case to determine economic viability. That request flies in the face of *Penn Central's* rule of ad hoc analysis, 438 U.S. at 124, and is particularly inappropriate in this case, because regardless of the precise standard to be applied, petitioner did not and could

not conceivably meet its burden.[21]

Agins and *Penn Central* laid down the principle that if a zoning regulation is a valid exercise of the police power, there is no taking if any "economically viable use" of the property remains. *Agins*, 447 U.S. at 260; *Penn Central*, 438 U.S. at 124.

As *Penn Central* stated, the decisions "*uniformly* reject the proposition that diminution in property value, *standing alone*, can establish a 'taking,' *see Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87-1/2% diminution in value)." 104 U.S. at 131 (emphasis added). *Agins* and *Keystone Bituminous Coal* reaffirmed that principle.[22]

Rather than focusing on diminution in value, *Penn Central* mandates that land use legislation must be analyzed by "focusing on the uses the regulations permit." 104 U.S. at 131. *See American Savings & Loan Ass'n v. County of Marin*, 653 F.2d 364, 368 (9th Cir. 1981) (no taking occurs if "a reasonable use of the property remains").

The courts of appeal that have addressed the issue have applied a consistent analytical framework in determining

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21 Contrary to petitioner's allegations, the County *did* present evidence of economic viability. It presented the 1980 LUE/LUO, which show on their face the availability of numerous groups of uses which are ordinarily economically viable uses (see Appendix A) and the waiver, variance and statutory procedures discussed herein (Appendices B and C); it presented declarations as to the availability of waivers and variances (see CR 124, Ex. J); and it presented petitioner's admissions as to the market value of its property before and after rezoning, as to return on investment, and as to the economic viability of use of the property as a dude ranch (CR 1; CR 124, Exs. G, U, V, W).

22 The Court gave further guidance in *Keystone* that the economic viability analysis requires a comparison between "the value that has been taken with the value that remains." It stated that this comparison "is by no means conclusive." The "important role" is that of the nature of the state action. *Keystone*, 107 S. Ct. at 1245, 1248.

whether economically viable use of property remains. They have uniformly held that immediate profitability (*i.e.*, whether current income covers current expenses of a permitted use) is not the only measure of economic viability. Indeed, it may be the wrong measure when the owner has historically held the property for long-term investment purposes. The courts have further held that remaining market value (excluding speculative uses) should also be considered, because even if the property is not profitable in its present use, others may be willing to purchase the property for other permissible uses.[23] (The use of different factors in different cases is entirely appropriate, inasmuch as the economic analysis in each case differs.) Using *any* of these factors, petitioner's claim fails:

(1) Historic use. The 1980 LUE/LUO permit the continuation of the historic uses to which petitioners have put the property since 1964 — holding the property for long-term investment with interim use for grazing purposes.[24]

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23 *See Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 107 S. Ct. 926 (1987) (court should consider not only immediately viable uses, but also market value — what knowledgeable long-term investors would pay for the property); *Park Avenue Tower Associates v. City of New York*, 746 F.2d 135, 139 (2d Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985) (crucial inquiry is not whether zoning ordinance lets plaintiffs use the property in immediately profitable manner, but whether uses allowed are sufficiently desirable that others might be interested in purchasing for those uses); *Pompa Construction Corp. v. City of Saratoga Springs*, 706 F.2d 418 (2d Cir. 1983) (same; while a particular permitted use would not provide a profitable return, the issue is whether someone would be interested in purchasing the property for such a purpose); *MacLeod v. County of Santa Clara*, 749 F.2d at 541 (where the present and primary uses of the property are holding for long-term investment with interim use for grazing, inquiry should not be into immediate profitability but into whether the challenged regulation permits continuance of those present and primary uses).

24 Petitioner admitted (CR 127, p. 21) that the standard for economic viability is met if the property can be held for investment for profit on sale. By its own definition, that standard was met. Similarly, *MacLeod v. County of Santa Clara*, 749 F.2d at 541, held that holding property for investment is a recognized use of property.

(2) Market value remaining. Petitioner admitted that the market value of the South Shore Property immediately following the impact of the regulation was $992,500, which had increased by March 1984 to $1,740,800.[25] In addition, if the North Shore Property, which has more intensive development rights, is taken into account, the per-acre value is even higher.

(3) Return on investment. Petitioner's own figures (the 1975 investment value of $521,000, plus income received, less taxes and operating expenses), show that it had a return on its investment on the South Shore Property alone of $461,035 after the effects of the 1980 LUE/LUO. The Ranch Company *nearly doubled its money.*[26] In addition, it obtained $500,000 in capital through refinancing the property in 1983. The market value of the South Shore Property steadily increased under the Rural Lands classification to $1,740,800 in March 1984 — *over three times* the 1975 investment value. (Again, the return on investment is further increased if the income and income potential of the North Shore Property are taken into account.)

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[25] As petitioner noted in its brief on appeal, "the value of land is determined by its use" (Br. at 22). Therefore, the market value reflects prudent investors' views of the value of the uses of the property. Petitioner's appraiser excluded speculative sales from his appraisal (CR 124, Ex. V).

While this market value is less than that petitioner claimed it would have enjoyed under the "Recreation" category ($1,600,000), petitioner suffered no loss in investment value. As to any reduction in anticipated profits, *Andrus v. Allard*, 444 U.S. 51, 66 (1979), has stated that "the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests."

[26] For the first time on appeal, petitioner suggested that return may have been reduced by inflation. Judicial notice of general inflation rates is improper, especially where not raised below, in the absence of evidence that general inflation rates are applicable to this property. *See San Luis Obispo Properties, Inc. v. Pacific Gas & Elec. Co.*, 28 Cal. App. 3d 556, 564, 104 Cal. Rptr. 733 (1972). Even if inflation is taken into account as petitioner wanted to do, it still had a 41% increase on the value of its investment. *See* Statistical Abstract of the United States, p. 468.

(4) Immediate profitability. Petitioner failed to submit evidence that no use or *combination of uses* permitted under Rural Lands could be developed in an immediately profitable manner. Some of the numerous groups of uses allowable on the South Shore Property (all of which are usually beneficial uses of land) include, but are not limited to:

1. Single Family Dwellings (2 for each of the 9 parcels);
2. Rural Sports and Group Facilities (including hunting and fishing clubs, dude ranches, health resorts, recreational camps, group camps, and equestrian facilities including riding academies);
3. Crop Production and Grazing;
4. Livestock and Nursery Specialties;
5. Mobile Home Dwellings.[27]

In opposition to the summary judgment motion, petitioner submitted sketchy expert declarations purporting to contest the economic viability of *certain* uses. Contrary to petitioner's assertion, however, that evidence completely failed to cover *all* the uses and combinations of uses available under Rural Lands.

Both courts below correctly recognized that petitioner had failed to submit *any* evidence showing that a dude ranch in

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[27] Contrary to the petitioner's assertion (Petition, p. 8), the County Planning Department memorandum did not state that only these five groups were economically viable. If the memorandum is considered at all (it is and has been objected to as a privileged memorandum produced with plaintiff's express agreement that privilege was not waived, see CR 136, p. 2), it addresses only certain uses of the property "that could provide the highest possible economic return for the least improvement costs" as *principal* uses of the property. It expressly does not address the economic viability of *other* uses as principal uses, or of *these* uses *in combination with* other uses.

combination with other uses (other than a working ranch)[28] would not be economically viable.

Further, petitioner's evidence failed to consider whether a dude ranch of a different size than the two chosen would have been profitable, whether profitability could be achieved by increasing winter utilization with organizational use of the facility (such as corporate retreats), whether a dude ranch on a portion of the property could be combined with single-family residences or other uses on other parcels to increase economies of scale, or whether waivers of dude ranch standards were available under LUO § 22.08.012. It also failed to present evidence on health resorts (other than hot-spring spas) (CR 134 at 29).

Also, petitioner's evidence completely failed to address the potential for combining uses on the property, for utilizing each of its nine legal parcels for different uses, or for utilizing the waivers and variances, discussed above, contained in LUO §§ 22.08.012 or 22.01.044 or Real Property Division Ordinance §§ 21.48.017 or 21.48.090. Moreover, petitioner failed to consider an agricultural preserve designation under Gov't Code § 51200, *et seq.*, which could dramatically lower the taxes on the property. Any or all of these actions could profoundly change the economic analysis in this case. Finally, it presented no evidence on the economic viability of the intensive uses permitted on the North Shore Property.

In summary, the courts below both correctly determined the 1980 LUE/LUO are constitutional on their face as a matter of

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28 In addition, petitioner submitted no *admissible* evidence as to the lack of economic viability of a dude ranch standing alone or in combination with a working ranch. The district court properly excluded petitioner's unsworn and late-filed reports on that subject, which had contradicted petitioner's earlier admissions that a dude ranch could (and would) be an economically viable use of the property (CR 1, para. 25; CR 124, Ex. V., p. 112, Ex. W, I-20, 21). The district court recognized, however, that even if these reports *were* considered, petitioner had still not submitted any evidence on the economic viability of a dude ranch in combination with other uses (See Appendix D to Petition, pp. 7-8).

law. The LUE/LUO did not alter the existing use of the property; they permit numerous other uses; and they have permitted a substantial return on investment. The LUE/LUO did not remove any of the "essential sticks in the bundle of property rights" such as the right to exclude others from the property or to sell it at will. Petitioner, along with all others in the County, will benefit from preservation of the natural beauty of Lake Nacimiento and from the provision of adequate public facilities. Petitioner, like the plaintiff in *Agins*, 447 U.S. at 262, is "free to pursue [its] reasonable investment expectations by submitting a development plan" to the County.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Dated: July 22, 1988

Respectfully submitted,

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APPENDIX A

EXCERPTS FROM COUNTY OF SAN LUIS OBISPO 1980 GENERAL PLAN LAND USE ELEMENT ("LUE")

TABLE O
ALLOWABLE USES
RURAL LANDS CATEGORY

USE GROUP		
1	AGRICULTURE	
	Ag Accessory Structures	S-3
*	Ag Processing	S-3
	Animal Husbandry Services	A
	Crop Production & Grazing	A
*	Farm Equipment & Supplies	S-3
	Livestock Specialties - Intensive	S-3
	Livestock Specialties - Minor	S-3
	Nursery Specialties	S-3
2	COMMUNICATIONS	
	Transmission & Receiving Facilities	A
3	CULTURAL, EDUCATION & RECREATION	
	Churches	S-4
	Off-Road Vehicle Courses	S-1
	Rural Sports & Group Facilities	S-4
	Schools - Pre thru Secondary	S-4
	Temporary Events	S-17

* Uses not allowed by special standards for south shore in Nacimiento Area Plan LUE.

4 * MANUFACTURING & PROCESSING

Collection Stations	S-5
Concrete, Gypsum & Plaster Products	S-15
Food & Kindred Products	S-5
Paving Materials	S-15
Power Generating Plants	S-1
Recycling & Scrap	S-5
Small Scale Manufacturing	S-5
Stone & Cut Stone Products	S-15
Structural Clay, Pottery-Related Products	S-15

5 RESIDENTIAL USES

Caretaker Residence	S-16
Domestic Animal Raising	A
Farm Labor Quarters	S-16
Home Occupations	S-16
Mobile Home Dwellings	S-8
Organizational Houses	S-8
Residential Accessory Uses	S-16
* Residential Care	S-6
Single Family Dwellings	A
Temporary Dwellings	S-17

6 RESOURCE EXTRACTION

Fisheries and Game Preserves	A
Forestry	A
Mining	S-9
Petroleum Extraction	S-9

7 RETAIL TRADE

Outdoor Retail Sales	S-7
Roadside Stands	S-3

8 SERVICES

* Correctional Institutions	S-1
Offices, Temporary	S-17
Public Safety Facilities	S-1
Storage, Accessory	S-16
Temporary Construction Yards	S-17
Waste Disposal Sites	S-1

9 TRANSIENT LODGINGS

Bed and Breakfast Facilities	S-12

10 TRANSPORTATION

Airfields & Landing Strips	S-13
Pipelines & Power Transmission	A
Public Utility Centers	S-1

11 WHOLESALE TRADE

Warehousing	S-19
Wholesaling & Distribution	S-19

KEY TO TABLE O

Use Status	Definition
A	Allowed use, unless otherwise limited by a specific planning area standard. Land Use Ordinance Chapter 22.03 ("Required Level of Processing") determines the permit necessary to establish an "A" use, and Chapters 22.04 through 22.06 determine the site design, site development, and operational standards that affect the use. See also the "Planning Area Standards" sections of the Land Use Element area plans to find any standards that may apply to a project in a particular community or area.
S	Special use, allowable subject to special standards and/or processing requirements, unless otherwise limited by a specific planning area standard. The following list shows where in the Land Use Ordinance to find the special standards that apply to particular uses.

"S" Number	Applicable Land Use Ordinance Section and/or Land Use Element Requirement	
1	22.08.120 b	Miscellaneous Uses
3	22.08.040	Agricultural Uses
4	22.08.060	Cultural, Educational & Recreation Uses
7	22.08.140	Outdoor Commercial Uses
9	22.08.170	Resource Extraction
12	22.08.260	Transient Lodgings

13	22.08.280	Transportation, Utilities & Communication
16	22.08.020	Accessory Uses
17	22.08.240	Temporary Uses
19	22.08.300	Wholesale Trade

D. LAND USE DEFINITIONS

This section contains definitions of the land uses that can be established under the Land Use Element. The uses defined here are allowed in the various land use categories as determined by the preceding charts. The definitions are intended only to list the various land uses included under each general heading, and do not explain what permit requirements or performance standards may be applicable to a given use. Standards and review procedures for establishing land uses are contained in the Land Use Ordinance.

The following definitions are correlated wherever possible with the use definitions of the Standard Industrial Classification Manual (SIC), published by the Executive Office of the President, Office of Management and Budget (1972). The SIC is referenced wherever appropriate.

Agricultural Accessory Structure

An uninhabited structure or building designed and built to store farm animals, implements, supplies or products (not including commercial greenhouses which are included under "Nursery Specialties," or buildings for agricultural processing activities) that contains no residential use and is not open to the public. Includes barns, grain elevators, silos, windmills, wind generators and other similar buildings and structures. (Amended 1981, Ord. 2089)

* Ag Processing

Establishments performing a variety of operations on crops after harvest, to prepare them for market on-site or further processing and packaging at a distance from the agricultural area including; alfalfa cubing; hay baling and cubing; corn shelling; drying of corn, rice, hay, fruits and vegetables; pre-cooling and packaging of fresh or farm-dried fruits and vegetables; grain cleaning and custom grinding; custom grist mills; custom milling of flour, feed and grain; sorting, grading and packing of fruits and vegetables; tree nut hulling and shelling; cotton gining; wineries and alcohol fuel production. Note: any of the above activities performed in the field with mobile equipment not involving permanent buildings are included under "Crop Production and Grazing." (SIC: 0723, 0724) (Amended 1981, Ord. 2063)

Airfields and Landing Strips

Transportation uses including any area of land or water used for the landing and take-off of aircraft; also, any appurtenant areas used for airport buildings and related facilities, including aircraft sales. Also includes agricultural, personal, restricted and public use landing strips, and heliports.

Animal Husbandry Services

Establishments primarily engaged in performing services for animals, including veterinary services, animal hospitals, and animal kennels (does not include feedlots, which are listed under "Livestock Specialties"). (SIC: Groups 074, 075)

Bed and Breakfast Facilities

Residential structures with one family in permanent residence where bedrooms without individual cooking facilities are rented

for overnight lodging, where at least one meal daily is provided. Does not include "Hotels and Motels," which are defined separately; nor rooming and boarding houses which are included under "Multi-Family Dwellings." (Amended 1981, Ord. 2063)

Caretaker Residence

A permanent residence that is secondary or accessory to the primary use of the property. A caretaker dwelling is used for housing a caretaker employed on the site of any non-residential use where a caretaker is needed for security purposes or to provide 24 hour care or monitoring of people, plants, animals, equipment, or other conditions on the site.

Churches

Religious organization facilities operated for worship or promotion of religious activities, including churches and religious Sunday-type schools. Other establishments maintained by religious organizations, such as full-time educational institutions, hospitals and other potentially-related operations (such as a recreational camp) are classified according to their respective activities.

* Collection Stations

Facilities for temporary accumulation and storage of recyclable discarded materials, which are subsequently transported to recycling centers or solid waste disposal sites for further processing. (Does not include automobile wrecking yards or any recycling processing facilities, which are listed under Recycling and Scrap; does not include temporary storage of toxic or radioactive waste materials).

* Concrete, Gypsum, and Plaster Products

Manufacturing establishments producing concrete building block, brick and all types of precast and prefab concrete products. Also includes ready-mix concrete batch plants, lime manufacturing, and the manufacture of gypsum products, such as plasterboard. (SIC: Groups 326, 327)

* Correctional Institutions

Institutions for confinement and correction of offenders sentenced by a court. Halfway houses and homes for delinquents, or other facilities not under court order, are classified in "Social and Service Organizations." (SIC: Group 9223)

Crop Production and Grazing

Agricultural uses including production of grains, field crops, vegetables, melons, fruits, tree nuts, flower fields and seed production, ornamental crops, tree and sod farms, associated crop preparation services and harvesting activities including but not limited to mechanical soil preparation, irrigation system construction, spraying and crop processing in the field not involving a permanent structure. Also includes the raising or feeding of beef cattle, horses, sheep and goats by grazing or pasturing. Does not include feedlots, which are included under "Livestock Specialties." The distinction between feedlots and grazing operations is established by the Land Use Ordinance, Chapter 22.08.

Domestic Animal Raising

The keeping, feeding or grazing of animals as an avocation, hobby or school project, subordinate to the principal residential use of a property. Includes species commonly considered as farm animals as well as exotic species, but does not include household pets. (See "Livestock Specialties.")

* Farm Equipment and Supplies

Establishments primarily engaged in sale or rental of agricultural machinery and equipment for use in the preparation and maintenance of the soil, the planting and harvesting of crops, and other operations and processes pertaining to work on the farm; also dairy and other livestock equipment. Includes agricultural machinery (except tractors and other motorized, self-propelled farm vehicles, which are included under "Auto, Mobilehome and Vehicle Dealers and Supplies"), dairy farm machinery and equipment, irrigation equipment, poultry equipment and frost protection equipment; hay, grain and feed sales; retail sales of prepackaged fertilizer and agricultural sprays. Sales may include the final assembly of farm machinery, implements or equipment from component parts received from the manufacturer in a partially assembled state, but not the creation of such components from raw materials. (Amended 1981, Ord. 2075)

Farm Labor Quarters

Includes residences, rooming and boarding houses and mess halls for farm workers employed on land owned by the owner of the building site on which the quarters are located.

Fisheries and Game Preserves

Resource extraction operations engaged in commercial fishing (including marine-related animals, mammals, etc.), and the operation of fish hatcheries, fish and game preserves, and game propagation. (SIC: Group 09)

* Food and Kindred Products

Manufacturing establishments producing or processing foods and beverages for human consumption and certain related products. Includes: (1) meat and poultry products (slaughter-

ing, canning, and curing and by-product processing); (2) dairy products processing; (3) canned and preserved fruit and vegetables and related processing; (4) grain mill products and by-products; (5) bakery products, sugar and confectory products; (6) fats and oil products, including rendering plants; (7) beverages and liquors (except wineries, which are included under "Ag Processing"); (8) and miscellaneous food preparation from raw products. (Operations on crops subsequent to their harvest are included under "Ag Processing"). (SIC: Group 20)

Forestry

Establishments primarily engaged in operation of timber tracts, tree farms, forest nurseries, and related activities such as reforestation services; also the gathering of gums barks, sap, moss and other forest products; also includes logging camps and sawmills (except for mills producing finished lumber, which are included under Lumber and Wood Products). (SIC: Groups 08, 241)

Home Occupations

The gainful employment of the occupant of a dwelling, with such employment activity being subordinate to the residential use of the property, and there is no display, no stock in trade, or commodity sold on the premises except as provided by the Land Use Ordinance, and no persons employed other than residents of the dwelling.

Livestock Specialties - Intensive

Agricultural establishments primarily engaged in commercial livestock keeping or feeding as a principal land use that, because of operational characteristics, may generate dust, odors or visual impacts that could adversely affect adjacent properties. Such uses include hog ranches; dairies, dairy and beef cattle feedlots; chicken, turkey and other poultry farms.

The distinction between a grazing operation and a feedlot is established by the Land Use Ordinance, Chapter 22.08 (see also "Domestic Animal Raising"). (SIC Groups 021 - 027)

Livestock Specialties - Minor

Includes commercial small-animal specialties operated as a principal land use, such as: rabbit farms and other fur-bearing animals; bee farms; avaries; worm farms, etc.

Mining

Resource extraction establishments primarily engaged in mining, developing mines or exploring for metallic minerals (ores), coal and non-metallic minerals (except fuels), or surface mines extracting crushed and broken stone, dimension stone or sand and gravel. (See also "Stone and Cut Stone Products"). (SIC: Groups 10, 11, 12, 14)

Mobile Home Dwelling

A vehicle without self-propulsion, designed and equipped as a dwelling unit with or without a permanent foundation, which is wider than 8 feet or longer than 32 feet.

Nursery Specialties

Agricultural establishments primarily engaged in the production of ornamental plants and other nursery products, grown under cover or outdoors. Also includes establishments engaged in the sale of such products (*e.g.* wholesale and retail nurseries) and commercial scale greenhouses (home greenhouses are included under "Residential Accessory Uses.") (Amended 1981, Ord. 2089)

Offices, Temporary

A mobilehome, recreational vehicle or modular unit used as: a temporary business or construction office during construction of permanent facilities on the same site; a temporary on-site real estate office for a development project; or a temporary business office in advance of permanent facility construction. (Amended 1981, Ord. 2063)

Off-Road Vehicle Courses

Rural areas set aside for the use of off-road vehicle enthusiasts including dirt bike, enduro, hill climbing or other off-road motorcycle courses; also, rural areas for competitive events utilizing four-wheel drive vehicles. Does not include sports assembly facilities, or simple access roads which are useable by only four-wheel drive vehicles.

Outdoor Retail Sales

Temporary retail trade establishments including: Farmer's Markets; sidewalk sales; seasonal sales involving christmas trees, fireworks, pumpkins or other seasonal items; semi-annual sales of art or handcrafted items in conjunction with community festivals or art shows; and retail sales or various products from individual motor vehicles in temporary locations outside the public right-of-way, not including bakery, ice cream and similar vending vehicles that conduct all sales within the right-of-way and do not stop in any location except on customer demand. Does not include flea markets or swap meets, which are included under "Storage Yards and Sales Lots." (Amended 1981, Ord. 2089)

Organizational Houses

Residential lodging houses operated by membership organizations for their constituents and not open to the general public.

Includes fraternity and sorority residential houses; monasteries and religious residential retreats.

* Paving Materials

Manufacturing establishments producing various common paving and roofing materials, including paving blocks made of asphalt, creosoted wood and various compositions of asphalt and tar. (SIC: Group 295)

Petroleum Extraction

Resource extraction establishments primarily engaged in: producing crude petroleum and natural gas; recovering oil from oil sands and shales; and producing natural gasoline and cycle condensate. Activities include exploration, drilling, oil and gas well operation and maintenance, operation of natural gas and cycle plants, the mining and extraction of oil from oil sands and shales, and on-site processing only to the extent necessary to permit extraction (*e.g.* enhanced recovery techniques including the use of steam generators), or to conform extracted crude to pipeline requirements. (SIC: Group 13)

Pipelines and Power Transmission

Transportation establishments primarily engaged in the pipeline transportation of crude petroleum; refined products of petroleum such as gasoline and fuel oils; natural gas; mixed, manufactured or liquified petroleum gas; or the pipeline transmission of other commodities. Power transmission includes facilities for the transmission of electrical energy for sale, including transmission lines for a public utility company. Does not include offices or service centers (classified in "Offices"), equipment and material storage yards (classified under "Storage yards and Sales Lots"), distribution substations (classified under "Public Utility Centers"), or powerplants (classified

under "Power Generating Plants"). (SIC: Groups 461, 491). (Amended 1981, Ord. 2063)

* Power Generating Plants

Establishments engaged in the generation and distribution of electrical energy for sale to consumers. Does not include cogeneration facilities which are allowed incidental to any approved commercial, industrial or agricultural use; or point-of-use wind generators which are included under "Agricultural Accessory Structures." Transmission lines located off the site of the power plant are included under "Pipelines and Power Transmission." Electrical substations are included under "Public Utility Centers." (SIC: Group 49)

Public Safety Facilities

Facilities operated by public agencies including fire stations, other fire prevention and firefighting facilities, police and sheriff substations and headquarters, including interim incarceration facilities (not including jails which are defined under "Correctional Institutions").

Public Utility Centers

Fixed-base structures and facilities serving as junction points for transferring utility services from one transmission voltage to another or to local distribution and service voltages. These uses include: electrical substations and switching stations; telephone switching facilities; natural gas regulating and distribution facilities; public water system wells, treatment plants and storage; and community wastewater treatment plants, settling ponds and disposal fields. These uses do not include office or service centers (classified in "Offices"), or equipment and material storage yards (classified in "Storage Yards and Sales Lots").

* Recycling and Scrap

Establishments primarily engaged in assembling, breaking up, sorting, temporary storage and distribution of recyclable or reusable scrap and waste materials, including auto wreckers engaged in dismantling automobiles for scrap. Also includes any storage of such materials in an area larger than 200 square feet or higher than six (6) feet. Does not include terminal waste disposal sites, which are separately defined. Does not include temporary storage of toxic or radioactive waste materials.

Residential Accessory Uses

Includes any use that is customarily part of a residence and is clearly incidental and secondary to a residence and does not change the character of the residential use. Residential accessory uses include the storage of vehicles and other personal property, and accessory structures including swimming pools, workshops, studios, greenhouses, garages, and guesthouses (without cooking or kitchen facilities).

* Residential Care

Establishments primarily engaged in the provision of residential social and personal care for children, the aged, and special categories of persons with some limits on ability for self-care, but where medical care is not a major element. Includes: children's homes; halfway houses; orphanages; rehabilitation centers; self-help group homes. (SIC: Group 836)

Roadside Stands

Open structures for the retail sale of agricultural products (except hay, grain and feed sales--included under Farm Equipment and Supplies), located on the site or in the area of the property where the products being sold were grown.

Rural Sports and Group Facilities

Facilities for special group activities such as: outdoor archery, pistol, rifle, and skeet clubs and facilities (indoor shooting facilities are included under the definition of "Amusements and Recreational Services"); dude ranches; health resorts including outdoor hot spring, spa or hot tub facilities; hunting and fishing clubs; recreational camps (including incidental RV camping but not RV parks); group or organized camps; incidental seasonal camping areas without facilities; and equestrian facilities including riding academies, schools, stables and exhibition facilities. (Amended 1981, Ord. 2063)

Schools - Preschool to Secondary

Pre-school, day-care centers, elementary and secondary schools serving grades 1 through 12, including denominational and sectarian. Kindergartens and military academies are also included. (SIC: Group 821)

Single-Family Dwelling

A detached building designed for and/or occupied exclusively by one family. Also includes attached ownership units using common wall development or airspace condominium ownership, where a proposed site qualifies for planned development through designation by planning area standard or through compliance with any planned development or cluster division standards of the Land Use Ordinance. (Amended 1981, Ord. 2063)

* Small Scale Manufacturing

Manufacturing establishments not classified in another major manufacturing group, including: Jewelry, silverware and plated ware; musical instruments; toys; sporting and athletic goods;

pens, pencils, and other office and artists' materials; buttons, costume novelties, miscellaneous motions, brooms and brushes; caskets and other miscellaneous manufacturing industries. Also included are artisan and craftsman-type operations which are not home occupations, and which are not secondary to on-site retail sales. Also includes small-scale blacksmith and welding services when accessory to another use. (SIC: Group 39) (Amended 1981, Ord. 2063)

* Stone and Cut Stone Products

Manufacturing establishments primarily engaged in cutting, shaping, and finishing marble, granite, slate, and other stone for building and miscellaneous uses. Also includes establishments primarily engaged in buying or selling partly finished monuments and tombstones. (SIC: Group 328)

Storage, Accessory

The indoor or outdoor storage of various materials on the same site as a principal building or land use which is other than storage, which supports the activities or conduct of the principle use.

* Structural Clay and Pottery-Related Products

Manufacturing establishments primarily producing brick and structural clay products, including pipe, china plumbing fixtures, and vitreous china articles, fine earthenware and porcelain electrical supplies and parts. Artist/craftsman uses are included in "Small Scale Manufacturing" or "Home Occupations." (SIC: Groups 325, 326)

Temporary Construction Yards

A storage yard for construction supplies, materials or equipment, located on a site other than the construction site itself or immediately adjacent to it, for use only during the actual construction of a project.

Temporary Dwelling

Includes the temporary use of a mobilehome or recreational vehicle as a dwelling unit, following the issuance of a building permit for a permanent residence while the permanent residence is under construction.

Temporary Events

Any use of a structure or land for an event for a limited period of time where the site is not to be permanently altered by grading or construction of accessory facilities. Events include but are not limited to art shows, rodeos, religious revivals, tent camps, outdoor festivals and concerts.

Textile Mills

Manufacturing establishments engaged in performing any of the following operations: Preparation of fiber and subsequent manufacturing of yarn, threads, braids, twine cordage; manufacturing woven fabric and carpets and rugs from yarn; dying and finishing fiber, yarn, fabric, and knit apparel; coating, waterproofing, or otherwise treating fabric; the integrated manufacture of knit apparel and other finished products from yarn; and the manufacture of felt goods, lace goods, non-woven fabrics and miscellaneous textiles. (SIC: Group 22)

Transmission and Receiving Facilities

Public, commercial and private electromagnetic and photo-electrical transmission, repeater and receiving stations for radio, television, telegraph, telephone, data network and other microwave applications; includes earth stations for satellite communications. (See "Broadcasting Studios.")

Warehousing

Establishments primarily engaged in the storage of farm products, furniture, household goods, or other commercial goods of any nature for later distribution to wholesalers and retailers. Does not include warehouse facilities where the primary purpose of storage is for goods for wholesaling Distribution. Does not include terminal facilities for handling freight (classified in "Vehicle and Freight Terminals"). Also includes warehouse, storage or mini-storage facilities offered for rent or lease to the general public.

Waste Disposal Sites

County-approved or operated refuse dumps, sanitary landfills and other solid waste disposal facilities of a terminal nature, where garbage, trash or other unwanted materials are abandoned, buried or otherwise discarded with no intention of re-use. This definition does not include disposal sites for toxic or radioactive waste materials.

Wholesaling and Distribution

Establishments engaged in selling merchandise to retailers; to industrial, commercial, institutional, farm, or professional business users; or to other wholesalers; or acting as agents or brokers in buying merchandise for or selling merchandise to such persons or companies. Includes such establishments as:

merchant wholesalers; agents, merchandise or commodity brokers, and commission merchants; assemblers, buyers and associations engaged in the cooperative marketing of farm products. (SIC: Group 50, 511-516, 518, 519)

APPENDIX B

EXCERPTS FROM COUNTY OF SAN LUIS OBISPO REAL PROPERTY DIVISION ORDINANCE AND 1980 LAND USE ORDINANCE ("LUO")

21.48.017 Lot line adjustments. (a) General. Lot line adjustments between two or more adjacent parcels, where the land taken from one parcel is added to an adjacent parcel and where a greater number of parcels than originally existed is not thereby created, shall be processed pursuant to this section.

(b) Application Contents. Lot line adjustment applications consisting of the following shall be submitted to the planning department:

(1) Four copies of a completed application form as required by the planning department;

(2) Two copies of a preliminary title report concerning the property, not more than six months old, with an updated title report required at the time of recordation of the certificate of compliance;

(3) Seven copies of a lot line adjustment map accurately drawn to scale. Measurements shall be identified by feet, square feet or acres to the nearest tenth. The map shall meet the following criteria:

(i) The size and scale of the prints shall be the same as those for tentative maps set forth in Section 21.48.035.

(ii) All exterior and interior lines shall be shown on the map and shall be identified by course and bearing description, based on survey data, calculated data, or information of record. If a survey is done, any monuments established must be shown on a record of survey filed in accordance with the Land Surveyors Act, Business and Professions Code Sections 8700, *et seq.*,

(iii) Proposed new lines and lines to be eliminated shall be so identified in written notation or by legend. Lines to be eliminated shall be dashed or otherwise

drawn so as to be clearly distinguishable from and subordinate to remaining and new lines,

(iv) Areas of resulting parcels shall be identified,

(v) All existing structures accurately located on the original parcels together with their dimensions, the distance between structures and the number of stories or height of each structure,

(vi) The distance from the existing structures to the boundary lines of the new parcel on which the structures are located. Such distances shall be established by a registered civil engineer or licensed land surveyor's survey when deemed necessary by the planning department,

(vii) The names, county road numbers and widths of abutting streets,

(viii) The locations, purpose and width of all existing and proposed easements, streets and appurtenant utilities,

(ix) The approximate location of all water-courses, drainage channels and existing drainage structures,

(x) Approximate high-water lines in lake, ocean or reservoir areas and areas subject to inundation,

(xi) A description of the property sufficient to identify it to the assessor's map,

(xii) North point and scale,

(xiii) Vicinity map,

(xiv) Location of wells and septic tanks.

(c) Criteria To Be Considered. A lot line adjustment shall not be approved or conditionally approved unless there is compliance with criteria relative to general plan consistency, parcel design, minimum lot area, environmental quality, and public health and safety criteria as specified in this title and other applicable county and state code provisions relating to real property divisions. These criteria will be considered satisfied if the resulting parcels maintain a position with respect to said criteria which is equal to or better than such position

prior to approval or conditional approval of the lot line adjustment.

(d) Action by Subdivision Review Board. The subdivision review board shall deny a lot line adjustment application if the criteria in subsections (a), (b) and (c) of this section are not met. If the criteria are met, the subdivision review board may recommend approval to the board of supervisors. A denial by the subdivision review board shall be final unless appealed to the board of supervisors within ten days of the denial.

(e) Action by Board of Supervisors. A lot line adjustment may be approved or conditionally approved only by the board of supervisors.

(f) Final Processing. The final processing for a lot line adjustment shall be the same as that for parcel maps specified in Sections 21.48.165, 21.48.170, 21.48.175, 21.48.200, 21.48.210, 21.48.215, and 21.48.230. In addition, lot line adjustment parcel maps shall be based on compiled record data when sufficient information exists on filed maps to locate and retrace the exterior boundary lines on the parcel map. The determination as to whether sufficient information exists shall be made by the county surveyor.

21.48.090 Adjustments. (a) In performing its responsibilities pursuant to this title, the subdivision review board may consider, and in cases where undue hardship would result from the application of the regulations established in this chapter, recommend conditional adjustments or exceptions from these regulations.

(b) Requests for adjustments shall be submitted in writing to the planning department prior to the regular meeting of the subdivision review board at which the application of the divider is to be considered. When the regulation from which the applicant is seeking relief is prescribed in Title 22 of this code, the applicant shall seek relief pursuant to that title.

(c) Requests for variation from standard improvement specifications and drawings and/or required offers of dedication

should be requested by the applicant in writing at the time the application is filed, in accordance with Section 21.48.045 (a)(3), and shall set forth facts to support the following criteria:

(1) That there are special circumstances or conditions affecting the property;

(2) That the exception is necessary for the preservation and enjoyment of a substantial property right of the applicant;

(3) That the granting of the exception will not be detrimental to the public welfare or injurious to other property in the vicinity in which the property is situated, and that it will not:

(i) Be detrimental to the traffic circulation system, the public utility and storm drainage systems,

(ii) Result in any increase in the county's maintenance costs,

(iii) Be detrimental to, nor degrade, any portion of the improvement work involved in the project.

(d) The subdivision review board shall not recommend approval of an exception pursuant to subsection (c) of this section unless it makes positive findings on all of the criteria listed in that subsection.

(e) The subdivision review board shall not recommend approval of any adjustment request pursuant to subsection (b) unless it finds each of the following:

(1) Such adjustment is necessary for the preservation and enjoyment of substantial property rights of the applicant; and

(2) The granting of the adjustment will not have a material adverse effect upon the health or safety of persons residing or working in the neighborhood of the property; and

(3) The granting of such adjustment will not be materially detrimental to the public welfare or injurious to property or improvements in said neighborhood. (Ord. 2070 Section 7, 1981; Ord. 1986 Section 2(part), 1979).

22.01.044 - Variance: A variance from the strict application of the terms of this Title or from planning area standards of the Land Use Element that do not relate to parcel size, density or limitations on use may be requested as follows:

(a) Application. A written application for variance is to be filed with the Planning Department on the form provided, accompanied by all graphic information required for Plot Plans by Section 22.02.030b(1) through (7) (Plot Plan Content), and any additional information necessary to explain the request. Acceptance of the application is subject to Section 22.01.032a (Consistency with the Land Use Element Required), and 22.02.022 (Determination of Completion).

(b) Notice and Hearing. Following acceptance of a variance application and completion of a staff report, the Planning Commission will conduct a public hearing on the variance request. The notice and scheduling of the hearing is to be pursuant to Section 22.02.036 (Public Hearing).

(c) Action on a Variance. The Planning Commission shall approve, approve subject to conditions, or disapprove a variance as set forth in this subsection. Such decision may be appealed to the Board of Supervisors as set forth in Section 22.01.042 (Appeal).

(1) Findings. Approval or conditional approval shall be granted only when the Planning Commission first determines that the variance satisfies the criteria set forth in Government Code Section 65906 by finding that:

(i) The variance authorized does not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and land use category in which such property is situated; and

(ii) There are special circumstances applicable to the property, including size, shape, topography, location, or surroundings, and because of these circumstances, the strict application of this Title would deprive the property of privileges enjoyed by other property in the vicinity and in the same land use category; and

(iii) The variance does not authorize a use that is not otherwise authorized in the land use category; and

(iv) The granting of such application does not, under the circumstances and conditions applied in the particular case, adversely affect the health or safety of persons, is not materially detrimental to the public welfare, nor injurious to nearby property or improvements.

(2) Conditions of Approval. In approving an application for variance, such conditions shall be adopted as are deemed necessary to enable making the findings set forth in Section 22.01.044c(1).

22.08.012 - Standards For Special Uses: Standards in this chapter are related to the special characteristics of the uses discussed and unless otherwise noted apply to developments *in addition to* all other applicable standards of this Title, and all applicable planning area standards of the Land Use Element.

* * *

(c) Whenever this chapter requires Development Plan approval, or when the applicant requests processing of another application as a Development Plan, the standards of this chapter, except those relating to residential density or limitations on the duration of a use, may be waived or modified by the Planning Commission based upon findings of facts that:

(1) Set forth the necessity for modification or waiver of standards by identifying the specific conditions of the site and/or vicinity which make standard unnecessary or ineffective.

(2) Identify the specific standards of this chapter being waived or modified.

(d) In no case, however, shall any standard of this chapter be reduced through Development Plan approval pursuant to Subsection c beyond the minimum standards of the other chapters of this Title, except through variance (Section 22.01.044).

22.08.120 - Miscellaneous Special Uses (S-1 and S-2). A use of land that is not listed elsewhere in this chapter, and is designated by the Land Use Element as allowable pursuant to this section, is subject to the following permit requirements in addition to all applicable provisions of this Title:

(a) Uses Requiring Site Plan Review (S-2): Uses designated by the Land Use Element as allowable pursuant to this subsection (S-2 uses on Table O, Part I of the Land Use Element), require Site Plan review in accordance with Section 22.02.032 (Site Plan).

(b) Uses Requiring Development Plan Review (S-1): Uses designated by the Land Use Element as S-1 uses allowable pursuant to this subsection require Development Plan review in accordance with Section 22.02.034 (Development Plan).

APPENDIX C

EXCERPTS FROM PERTINENT CALIFORNIA STATUTES IN EFFECT IN 1980 — 1981

GOVERNMENT CODE (West 1983):

§ 51240. Authority to limit use.

Any city or county may by contract limit the use of agricultural land for the purpose of preserving such land pursuant and subject to the conditions set forth in the contract and in this chapter. A contract may provide for restrictions, terms, and conditions, including payments and fees, more restrictive than or in addition to those required by this chapter.

§ 51242. Land subject of contract.

No city or county may contract with respect to any land pursuant to this chapter unless the land:

(a) Is devoted to agricultural use.

(b) Is located within an area designated by a city or county as an agricultural preserve.

§ 51244. Term; renewal; notice.

Each contract shall be for an initial term of no less than 10 years. Each contract shall provide that on the anniversary date of the contract or such other annual date as specified by the contract a year shall be added automatically to the initial term unless notice of nonrenewal is given as provided in Section 51245.

§ 65302. Elements required to be included in plan.

The general plan shall consist of a statement of development policies and shall include a diagram or diagrams and text setting forth objectives, principles, standards, and plan proposals . . . .

§ 65361. Amendments of mandatory elements; application.

(a) Except as provided in subdivision (b), no mandatory element of a general plan shall be amended more frequently than three times during any calendar year, which amendment or amendments may occur at any time as determined by the legislative body.

§ 69906. Variances from zoning ordinances.

Variances from the terms of the zoning ordinances shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.

Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated.

A variance shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property. The provisions of this section shall not apply to conditional use permits.

§ 66474. Findings justifying disapproval.

A legislative body of a city or county shall deny approval of a tentative map, or a parcel map for which a tentative map was not required, if it makes any of the following findings:

(a) That the proposed map is not consistent with applicable general and specific plans as specified in Section 65451 . . . .

REVENUE AND TAXATION CODE (West 1987):

§ 423. Factors considered in valuation.

Except as provided in Section 423.7, when valuing enforceably restricted open-space land, other than land used for the production of timber for commercial purposes, the county assessor shall not consider sales data on lands, whether or not enforceably restricted, but shall value such lands by the capitalization of income method in the following manner:

(a) The annual income to be capitalized shall be determined as follows:

(1) Where sufficient rental information is available the income shall be the fair rent which can be imputed to the land being valued based upon rent actually received for the land by the owner and upon typical rentals received in the area for similar land in similar use, where the owner pays the property tax. Any cash rent or its equivalent considered in determining the fair rent of the land shall be the amount for which comparable lands have been rented, determined by average rents paid to owners as evidenced by typical land leases in the area, giving recognition to the terms and

conditions of the leases and the uses permitted within the leases and within the enforceable restrictions imposed.

(2) Where sufficient rental information is not available, the income shall be that which the land being valued reasonably can be expected to yield under prudent management and subject to applicable provisions under which the land is enforceably restricted. There shall be a rebuttable presumption that "prudent management" does not include use of the land for a recreational use, as defined in subdivision (n) of Section 51201 of the Government Code, unless the land is actually devoted to such use.

(3) Notwithstanding any other provision herein, if the parties to an instrument which enforceably restricts the land stipulate therein an amount which constitutes the minimum annual income per acre to be capitalized, then the income to be capitalized shall not be less than the amount so stipulated.